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<b>L.M., Appellant</b>	)	
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<b>and</b>	)	<b>Docket No. 21-0644</b>
	)	<b>Issued: March 15, 2022</b>
<b>U.S. POSTAL SERVICE, GREENE POST</b>	)	
<b>OFFICE, Greene, NY, Employer</b>	)	
	)	

<sup>3</sup> The Board notes that OWCP received additional evidence following the October 5, 2020 decision. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

## **ISSUE**

The issue is whether appellant has met her burden of proof to establish that the acceptance of her claim should be expanded to include additional conditions as a consequence of the accepted December 12, 2014 employment injury.

## **FACTUAL HISTORY**

This case has been previously before the Board.<sup>4</sup> The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On January 5, 2015 appellant, then a 51-year-old rural carrier, filed a notice of recurrence (Form CA-2a) claiming disability under OWCP File No. xxxxxx938.<sup>5</sup> She alleged that she reinjured her left shoulder moving mail from her vehicle to her supervisor's vehicle on December 12, 2014 while in the performance of duty. Appellant stopped work on that date. OWCP converted the recurrence claim to a new traumatic injury claim (Form CA-1) and assigned OWCP File No. xxxxxx312. On January 14, 2016 OWCP accepted the claim for partial rotator cuff tear of the left shoulder and paid appellant retroactive wage-loss compensation on the supplemental rolls as of February 1, 2015 and on the periodic rolls as of July 24, 2016.

In a May 5, 2016 report, Dr. Thomas Van Gorder, a Board-certified orthopedic surgeon, diagnosed status post shoulder repair for rotator cuff tear of the left shoulder and a partial cuff tear of the right shoulder. He noted her initial injury to her left shoulder in June 2013, and her subsequent injury to her left shoulder in December 2014. He related that appellant had developed discomfort in the right shoulder, noting that she did not have specific trauma to the right shoulder, and opined that her right shoulder condition resulted from favoring her left shoulder. Dr. Van Gorder noted that a right shoulder magnetic resonance imaging (MRI) scan in June 2015 revealed a partial cuff tear and tendinitis, and that appellant was unable to obtain treatment for the right shoulder. He also noted that the right shoulder had excellent strength and a little subacromial crepitus.

In a July 28, 2016 report, Dr. Van Gorder diagnosed status post rotator cuff tear of the left shoulder and a partial tear with tendinitis of the right shoulder. Regarding the right shoulder, he explained that appellant developed impingement pain, tendinitis, and discomfort of the right shoulder, which he opined "is definitely related to her left shoulder injury." Dr. Van Gorder concluded that her right shoulder condition was caused by overuse secondary to favoring her left shoulder, which had been injured at work.

In an August 3, 2016 report, Dr. Van Gorder repeated his opinion from his July 28, 2016 report regarding the status and casual relationship of the right shoulder condition.

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<sup>4</sup> Docket No. 18-1514 (issued July 18, 2019).

<sup>5</sup> In OWCP File No. xxxxxx938, OWCP accepted appellant's July 22, 2013 occupational disease claim (Form CA-2) for complete tear of the left rotator cuff.

In a letter dated August 29, 2016, counsel requested that the acceptance of appellant's claim be expanded to include the additional conditions of impingement, tendinitis, and a partial rotator cuff tear of the right shoulder. He alleged that the conditions were a consequence of overuse of the right shoulder due to her accepted left shoulder conditions. Counsel argued that Dr. Van Gorder provided an unequivocal opinion and the requisite medical rationale to establish that appellant's right shoulder condition was related to overuse to compensate for the work-related injury to her left shoulder.

In a development letter dated November 18, 2016, OWCP advised appellant of the evidence needed to establish her claim for consequential injury to her right shoulder. It afforded appellant 30 days to submit additional evidence.

OWCP thereafter received a June 12, 2015 MRI scan of the right shoulder interpreted by Dr. Imanuel Somers-Dehaney, a Board-certified diagnostic radiologist, which revealed a partial tear of the supraspinatus partial articular surface tendon with avulsion of approximately 50 percent, impingement on the myotendinous junction of the supraspinatus tendon with fluid along both articular and bursal substance of subacromial subdeltoid bursa, bursitis, and biceps tendon tenosynovitis.

On December 16, 2016 OWCP requested that a district medical adviser (DMA) provide an opinion as to whether the accepted employment injury to appellant's left shoulder was competent to produce the injury to the right shoulder. It requested that the DMA review and specifically comment on the opinion provided by Dr. Van Gorder in his July 28 and August 3, 2016 reports regarding the conditions of right shoulder impingement, right shoulder tendinitis, and right partial rotator cuff tear.

In a December 29, 2016 report, Dr. David J. Slutsky, a Board-certified orthopedic hand surgeon serving as a DMA, noted appellant's history of injury and medical treatment. Regarding the right shoulder conditions, the DMA concluded that the acceptance of appellant's claim should not be expanded to include the consequential conditions of right shoulder impingement, right shoulder tendinitis, and right partial rotator cuff tear. He advised that it was impossible to determine with any certainty whether the left shoulder condition had caused the right shoulder condition, unless an MRI scan of the right shoulder was performed prior to the work-related injury of the left shoulder on December 12, 2014. The DMA explained that an asymptomatic partial right rotator cuff tear of the right shoulder could not be ruled out and that an MRI scan of the right shoulder prior to the December 12, 2014 left shoulder injury was "the only way to determine if this lesion was preexisting or whether it developed following the accepted work-related injury." He referred to Dr. Van Gorder's December 18, 2014 notes that appellant was pain free with normal shoulder ROM following the left rotator cuff repair and explained that overuse of the right shoulder was "not medically probable in view of the normal functioning of her left shoulder." The DMA also reviewed Dr. Van Gorder's medical reports dated July 28 and August 3, 2016 and noted that appellant stopped work in December 2014 and remained off work since that time, and that there was no mention of appellant's right shoulder pain until May 5, 2016, almost two years later. He further noted that appellant had a right shoulder MRI scan on June 12, 2015, more than one year following the left rotator cuff repair, and explained that if she "had remained working in some capacity, especially at a job that required overhead lifting, it would be reasonable to assign the patient's development of right shoulder pain and partial rotator cuff tear to overuse, but this is not the case." The DMA noted that, if additional medical records were provided that documented the

onset of appellant's right shoulder pain while she was still employed by the employing establishment or at any other job following the left rotator cuff repair, then the issue of causation could be revisited.

By decision dated March 8, 2017, OWCP denied expansion of the acceptance of appellant's claim, finding that the medical evidence of record was insufficient to establish that the conditions of right shoulder impingement, right shoulder tendinitis, and right partial rotator cuff tear were consequential to the accepted left shoulder employment injury.

By letter dated June 20, 2017, OWCP referred appellant for a second opinion examination with Dr. Kevin Scott, a Board-certified orthopedic surgeon, to assess appellant's current condition.

An August 31, 2017 MRI scan of the right shoulder interpreted by Dr. Andrew Goldschmidt, a Board-certified diagnostic radiologist, revealed the absence of a full-thickness rotator cuff tear. In a July 13, 2017 report, Dr. Scott noted appellant's history of injury and treatment, examined appellant, and provided physical examination findings. He found full range of motion (ROM) of both shoulders and diagnosed left shoulder rotator cuff tear. Dr. Scott explained that there were no other injuries due to the December 12, 2014 employment injury. He noted appellant's preexisting left shoulder rotator cuff tear from her 2013 injury. Dr. Scott reviewed the June 12, 2015 MRI scan of the right shoulder, which revealed partial tearing of the supraspinatus tendon, subacromial bursitis, and biceps tendon tenosynovitis. He concluded that the accepted conditions had resolved.

On March 6, 2018 appellant, through counsel, requested reconsideration. Counsel argued that OWCP had reached a false conclusion based upon the report of the DMA, Dr. Slutsky, that the DMA's report should not have been relied upon, and that appellant should have been referred for a second opinion evaluation regarding the right shoulder.

OWCP received additional medical evidence.

In a March 20, 2018 report, Dr. Michael B. Lax, Board-certified in occupational medicine, examined appellant and provided his findings. He diagnosed bilateral rotator cuff tears. Dr. Lax opined that, within a reasonable degree of medical certainty, appellant's work as a rural postal delivery worker with many years of exposure to heavy lifting (40-pound buckets of mail) in small spaces (her delivery car), repetitive movements (upwards of 500 stops for mail), and also a few specific events, including lifting heavy buckets of mail in December 2014 and turning in her car to grab a package, contributed significantly to the development of both bilateral chronic shoulder pain and rotator cuff tears.

On April 30, 2018 OWCP requested clarification from Dr. Scott, regarding whether appellant developed a right shoulder condition as a consequence of her accepted work-related left shoulder condition.

In a May 3, 2018 addendum, Dr. Scott noted the definition of a consequential condition, referred to his prior report and examination, and opined, "I do not find a consequential injury for the left or right shoulder."

By decision dated May 29, 2018, OWCP denied modification of the March 8, 2017 decision.

On August 2, 2018 appellant, through counsel, filed a timely appeal from the May 29, 2018 OWCP merit decision. By decision dated July 18, 2019, the Board affirmed the May 29, 2018 decision.<sup>6</sup>

OWCP continued to receive medical evidence regarding appellant's left shoulder condition.

On July 17, 2020 appellant, through counsel, requested reconsideration and submitted a March 7, 2018 report from Dr. Lax. Counsel argued that a conflict existed between Dr. Lax and the DMA, Dr. Slutsky, as to whether appellant suffered a consequential injury.

In a March 7, 2018 letter, Dr. Lax noted that he saw appellant on August 8, 2017, referenced his physical findings from August 8, 2017, and advised that appellant suffered from a right shoulder condition characterized by a rotator cuff tear and impingement. He related that appellant gave a history that her right shoulder became symptomatic in 2014, shortly after she had returned to work following a left shoulder rotator cuff repair and subsequent surgical repair related to OWCP File No. xxxxxx938. Dr. Lax explained that appellant had just recuperated from surgery and was protecting her left shoulder and utilizing her right arm to compensate. He opined that the "same work duties, which caused the left shoulder injury then contributed to the injury in the right shoulder. Consequently, it is my opinion that [appellant's] right shoulder impingement and rotator cuff tear was caused or aggravated by her attempting to compensate for the left shoulder injury." Dr. Lax noted that he had reviewed the DMA's December 29, 2016 report and disagreed that normal ROM and reduced pain in the left shoulder precluded the likelihood that appellant was compensating for the left shoulder by using her right shoulder. He opined that "it was only natural for her to protect the left shoulder from reinjury by using the right arm more." Dr. Lax noted that Dr. Van Gorder obtained an MRI scan of her right shoulder in June 2015, which supported that the symptoms were present. He explained that an MRI scan was not usually pursued until the symptoms became chronic.

By decision dated October 5, 2020, OWCP denied modification of the July 18, 2019 decision.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim, including the fact that the individual is an employee of the United States within the meaning of FECA,<sup>7</sup> that the claim was filed within the applicable time limitation, that an injury was sustained while in the performance of duty as alleged, and that any disability or specific condition for which compensation is claimed is causally related to the

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<sup>6</sup> *Supra* note 4.

<sup>7</sup> *K.R.*, Docket No. 20-0995 (issued January 29, 2021); *A.W.*, Docket No. 19-0327 (issued July 19, 2019); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

employment injury.<sup>8</sup> These are the essential elements of every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.<sup>9</sup>

The general rule respecting consequential injuries is that, when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury is deemed to arise out of the employment, unless it is the result of an independent intervening cause, which is attributable to the employee's own intentional conduct.<sup>10</sup> The subsequent injury is compensable if it is the direct and natural result of a compensable primary injury. With respect to consequential injuries, the Board has held that, where an injury is sustained as a consequence of an impairment residual to an employment injury, the new or second injury, even though nonemployment related, is deemed, because of the chain of causation, to arise out of and in the course of employment and is compensable.<sup>11</sup>

A claimant bears the burden of proof to establish a claim for a consequential injury.<sup>12</sup> As part of this burden, he or she must present rationalized medical opinion evidence, based on a complete factual and medical background, establishing causal relationship. The opinion must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship of the diagnosed condition and the accepted employment injury.<sup>13</sup>

### ANALYSIS

The Board finds that appellant has not met her burden of proof to establish that acceptance of her claim should be expanded to include additional conditions as a consequence of the December 12, 2014 employment injury.

Preliminarily, the Board notes that it is unnecessary for the Board to consider the evidence appellant submitted prior to the issuance of OWCP's May 29, 2018 merit decision because the Board considered that evidence in its July 18, 2019 decision. Findings made in prior Board decisions are *res judicata* absent further review by OWCP under section 8128 of FECA.<sup>14</sup>

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<sup>8</sup> *J.B.*, Docket No. 20-1566 (issued August 31, 2021); *see J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

<sup>9</sup> *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

<sup>10</sup> *See L.M.*, Docket No. 18-1514 (issued July 18, 2019); *K.D.*, Docket No. 17-1894 (issued August 6, 2018); *A.M.*, Docket No. 18-0685 (issued October 26, 2018); *Mary Poller*, 55 ECAB 483, 487 (2004); Arthur Larson & Lex K. Larson, *The Law of Workers' Compensation* § 10-1.

<sup>11</sup> *See K.D., id.*; *see also S.S.*, 59 ECAB 315 (2008).

<sup>12</sup> *See C.H.*, Docket No. 20-0228 (issued October 7, 2020); *P.P.*, Docket No. 19-1359 (issued April 30, 2020).

<sup>13</sup> *See T.S.*, Docket No. 20-0968 (issued August 17, 2021); *K.W.*, Docket No. 18-0991 (issued December 11, 2018); *P.M.*, Docket No. 18-0287 (issued October 11, 2018).

<sup>14</sup> *See M.F.*, Docket No. 21-0390 (issued August 23, 2021); *P.B.*, Docket No. 20-0124 (issued March 10, 2021); *J.S.*, Docket No. 19-0022 (issued November 4, 2020); *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998).

In a March 7, 2018 letter, Dr. Lax referred to appellant's right shoulder MRI scan from June 2015, which revealed a partial cuff tear and tendinitis. He explained that it was his "opinion that [appellant's] right shoulder impingement and rotator cuff tear was caused or aggravated by her attempting to compensate for the left shoulder injury." However, the record reflects that, while appellant had returned to work following her left shoulder injury in OWCP File xxxxxx938, she did not return to work following the accepted December 12, 2014 employment injury. Therefore, it is unclear how Dr. Lax formulated his opinion that appellant compensated for her left shoulder, following the accepted December 12, 2014 employment injury. The Board has held that a medical opinion that lacks medical rationale is of limited probative value.<sup>15</sup> Moreover, in this letter, Dr. Lax opined that the "same work duties, which caused the left shoulder injury then contributed to the injury in the right shoulder." He did not further explain in this report what activities appellant engaged in that caused her right shoulder conditions. His opinion was, therefore, not based on a complete factual background.<sup>16</sup> The Board also finds that as Dr. Lax attempted to relate appellant's diagnosed right shoulder conditions to performance of her employment duties, and conversely attempted to opine that her right shoulder condition was a consequence of her December 12, 2014 left shoulder injury, his opinion was internally consistent. The Board has held that medical reports are of limited probative value if they are internally inconsistent.<sup>17</sup>

In his March 20, 2018 report, Dr. Lax opined that, within a reasonable degree of medical certainty, appellant's work as a rural postal delivery worker with many years of exposure to heavy lifting (40-pound buckets of mail) in small spaces (her delivery car), repetitive movements (upwards of 500 stops for mail), and also a few specific events, including lifting heavy buckets of mail in December 2014 and turning in her car to grab a package, contributed significantly to the development of both bilateral chronic shoulder pain and rotator cuff tears.

As Dr. Lax did not provide the necessary medical rationale to establish that appellant's right shoulder conditions were a consequence of the accepted left shoulder injury of December 12, 2014, his reports were insufficient to overcome the weight accorded to Dr. Scott or to create a conflict in the medical opinion evidence. The Board thus finds that appellant has not met her burden of proof.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

### **CONCLUSION**

The Board finds that appellant has not met her burden of proof to establish that the acceptance of her claim should be expanded to include the additional conditions as a consequence of the accepted December 12, 2014 employment injury.

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<sup>15</sup> *J.P.*, Docket No. 19-0129 (issued April 26, 2019).

<sup>16</sup> *Y.H.*, Docket No. 19-0835 (issued October 4, 2019); *see F.C.*, Docket No. 19-0594 (issued August 13, 2019).

<sup>17</sup> *S.H.*, Docket No. 19-0631 (issued September 5, 2019); *L.L.*, Docket No. 18-0861 (issued April 5, 2019).

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 5, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 15, 2022  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board